FILED
NOV 18 1993
OFFICE OF THE CLERK

No. 93-373

In The

Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD AND THE STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

REPLY BRIEF FOR PETITIONER

JOEL D. SIEGAL
Counsel of Record
ROBERT S. RAYMAR
RONNIE F. LIEBOWITZ
BRUCE S. ETTERMAN
MATTHEW E. MOLOSHOK
HELLRING LINDEMAN
GOLDSTEIN & SIEGAL
Attorneys for Petitioner
One Gateway Center
Newark, New Jersey 07102-5386
(201) 621-9020

4033
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Further Reasons for Granting the Writ	1
I. The Decision Sought to Be Reviewed Is a Final Decision	1
II. Cliffs Has Standing to Bring the Petition	3
III. The Case Presents Important, Recurring Issues as to What Race-Conscious Actions Are Permissible Under the Fourteenth Amendment	8
Conclusion	10

TABLE OF CITATIONS

Cases Cited:

Akron Board of Education v. State Board of Education of Ohio, 490 F.2d 1285 (6th Cir. 1974), *cert. denied*, 417 U.S. 932 (1974)	4, 5
Avery v. Midland County, 390 U.S. 474 (1968)	2, 3
Board of Education v. Allen, 392 U.S. 236 (1968)	4, 6
Bradley v. School Board of City of Richmond, Virginia, 338 F. Supp. 67 (E.D.Va. 1972), *rev'd on other grounds*, 462 F.2d 1058 (4th Cir. 1972), *aff'd sub nom. School Board of City of Richmond, Virginia v. State Board of Education*, 412 U.S. 92 (1973)	5

Contents

	Page
Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956)	6
City of Newark v. New Jersey, 262 U.S. 192 (1923)	6
City of Trenton v. New Jersey, 262 U.S. 182 (1923)	6, 7
Clowes v. Terminix Int'l Inc., 109 N.J. 575, 538 A.2d 794 (1988)	9
Hull v. Quitman County Bd. of Education, 1 F.3d 1450 (5th Cir. 1993)	8
Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 566 A.2d 229 (App. Div. 1989)	9
McKesson v. Division of Alcoholic Beverages, 496 U.S. 18 (1990)	4
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1947)	2
Rogers v. Brockette, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979)	7
School Board of the City of Richmond, Virginia v. Balliles, 829 F.2d 1308 (4th Cir. 1987)	4, 5
Williams v. Baltimore, 289 U.S. 36 (1933)	6

Contents

Page

Statutes Cited:

28 U.S.C. § 1257(a) 1, 3

N.J.S.A. 18A:38-13 ..... 7, 8

United States Constitution Cited:

Fourteenth Amendment 4, 6, 8, 10

Rule Cited:

New Jersey Rules of Court, R. 2:2-1 1

FURTHER REASONS FOR GRANTING THE WRIT

I. THE DECISION SOUGHT TO BE REVIEWED IS A FINAL DECISION

Respondents present no serious challenge to the finality of the New Jersey Superior Court's decision under Article III or 28 U.S.C. § 1257(a). When the administrative proceeding began, the Board of Education of the Borough of Englewood Cliffs ("Cliffs") sought *severance* of its sending-receiving relationship with the Board of Education of the City of Englewood ("Englewood"). Englewood cross-petitioned for an *injunction* against Cliffs and Englewood students attending Tenafly High School, and for *immediate regionalization* of the three high school districts. All three of these issues have been finally decided. The Appellate Division affirmed the State Board of Education's decision denying Cliffs' request for severance, denying Englewood's request for regionalization and instituting an injunction. The Supreme Court of the State of New Jersey affirmed these final decisions.

A year after it ruled on the pending matters, the State Board of Education voted by resolution (rather than by an order in this case), to pursue a study of the potential for forming a regional district. *See* Appendix D to Englewood's Brief in Opposition. The regional district could include but would not necessarily be limited to high schools and could, but would not necessarily, include Tenafly and Cliffs. *Id.* at 11a. Cliffs appealed this and the New Jersey Supreme Court found such a study authorized.[1] Appendix A

1. In bringing its appeal to the New Jersey Supreme Court, Cliffs filed a Notice of Appeal on July 15, 1992, on the specific grounds that the decision constituted a final decision which violated constitutional rights (*see* New Jersey Rules of Court R. 2:2-1). In addition, Cliffs filed a Petition for Certification on July 15, 1992 (an application for discretionary review of a final judgment involving non-constitutional issues in the case) (*see id.*). Cliffs also filed a (Cont'd)

to Petition at 3a. Thus, the issue of whether a regionalization study will take place has also been finally decided by the New Jersey courts.

All the issues that were before the New Jersey courts have therefore been decided. No part of the controversy remains for the state courts to address. The state courts did not retain jurisdiction; the New Jersey Supreme Court's decision was thus the last judicial act in this litigation and "final." *Avery v. Midland County*, 390 U.S. 474, 478 n.2 (1968).

What may or may not happen, if and when the regionalization study is completed, has no bearing on the finality of the New Jersey Supreme Court's decision. The constitutional violation that the orders it affirmed inflicts will continue without redress regardless of how the study concludes. If the study results at some date in some regionalization order from the State Board — the form of which one could not today even guess at — or if regionalization is found undesirable — as previously held by the ALJ, Commissioner and State Board — any such order may engender a *new* legal proceeding. It would not be part of *this* case.

The primary case relied upon by the Respondents, *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1947), is inapposite here. There the issue of liability had been determined, but the issue of a remedy remained possibly undecided. In this case, unlike *Republic Natural Gas*, the state courts have made their final decision, including remedies: to deny severance, to enjoin private

---

(Cont'd)
motion for leave to appeal from the order of the Appellate Division as it related to the regionalization study, describing the filing as a precautionary measure. *See* Petition to Enlarge Time to File Motion for Leave to Appeal, dated June 30, 1992 at ¶ 3. Englewood in fact filed a Notice of Cross-Appeal, July 27, 1993, regarding regionalization evidencing its belief that the decisions were final. The New Jersey Supreme Court never struck the notice of appeal nor ruled that any issue in the case was non-final.

tuition, to deny regionalization and to affirm the decision to study the issue. Instead, this case more closely resembles that of *Avery v. Midland County, supra.* In *Avery* the Supreme Court of Texas had ruled that population does not strictly govern the apportionment of seats on the "Commissioner's Court," a local governmental body. The Texas Supreme Court did not state how the apportionment of the seats on the Commissioner's Court should be made, and instead directed the Commissioner's Court to determine the redistricting itself within the general constitutional boundaries delineated by the Texas Supreme Court. This Court found that judgment to be final despite the fact that the order required ongoing proceedings in the Commissioner's Court to effect reapportionment, which could lead to further court challenge when completed. Very simply, despite the ongoing administrative proceedings, ". . . the Texas Supreme Court opinion contemplated no further proceedings in the lower courts. . . ." *Id.*, 390 U.S. at 4778 n.2. For the same reasons, the decision of the New Jersey Supreme Court in this case is final and ripe for review under Article III and 28 U.S.C. § 1257(a).

II. CLIFFS HAS STANDING TO BRING THE PETITION

Respondents challenge to standing is equally inapposite. A school board, such as Cliffs, has Article III standing to challenge state action on federal equal protection grounds, where that action both (1) violated the equal protection rights of pupils and parents within Cliffs' school district, and (2) affects directly the schools of the district which the board is charged with operating. This exact issue was raised by the Board of Education of the City of Englewood before the Superior Court, Appellate Division and Supreme Court of the State of New Jersey. The New Jersey Supreme Court requested and received supplemental letter memoranda from the parties on just this issue. Both courts ultimately ruled on the federal constitutional issue in this matter on the merits, implicitly finding that Cliffs had standing to assert such

issues. There is no reason to disturb the standing accorded by the decisions below during this continuation of the state court proceedings. *Cf. Board of Education v. Allen*, 392 U.S. 236 (1968) (standing before the New York courts continued in this Court); *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 30 (1990) ("... when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case 'whoever may be the parties to the original suit. . . .' ") (citations omitted).

Leading cases of this Court and the several United States Courts of Appeals support granting standing to Cliffs. This Court has found standing for a school board to sue its "creator," the State of New York, to challenge school textbook policies as violative of the equal protection guaranty in *Board of Education v. Allen, supra,* because, the Court found, its board members had a personal stake in upholding their oaths to support the United States Constitution. 392 U.S. at 241 n.5.

In *Akron Board of Education v. State Board of Education of Ohio*, 490 F.2d 1285 (6th Cir. 1974), *cert. denied,* 417 U.S. 932 (1974), the Court held that a municipal board of education had standing to challenge state action on federal equal protection grounds. Acknowledging that the Fourteenth Amendment to the United States Constitution protects "citizens" and hence the rights at issue belonged to the pupils and parents within the jurisdiction of the board, the court found that the school board had a sufficiently close relationship with its pupils and their parents to assert their rights. *Id.* at 1289. The court also recognized, as an independent basis for standing to assert these equal protection rights, that the same state action giving rise to the alleged violation of the equal protection rights of the district's pupils and their parents would also result in direct harm to the school district. *Id.* at 1289-1290.

The court in *School Board of the City of Richmond, Virginia v.*

Balliles, 829 F.2d 1308 (4th Cir. 1987), relying on the same grounds as *Akron*, held the Richmond School Board had standing to assert the equal protection rights of its students. *Id.* at 1311. The underlying district court decision which the Fourth Circuit thus reaffirmed, *Bradley v. School Board of City of Richmond, Virginia*, 338 F. Supp. 67 (E.D.Va. 1972), *rev'd on other grounds*, 462 F.2d 1058 (4th Cir. 1972), *aff'd sub nom. School Board of City of Richmond, Virginia v. State Board of Education*, 412 U.S. 92 (1973), had stated in this regard:

> . . . were school boards not to be accorded standing, serious deprivations to constitutional rights might occur, especially in situations wherein individual plaintiffs might well lack the resources to bring and maintain the type of mammoth lawsuit involved.

Id., 338 F. Supp. at 230.

As these cases make clear, Cliffs has standing to challenge state action based on the federal equal protection rights of the pupils and their parents within its district. Cliffs is charged with the duty to oversee the public education of its school-age population and has the same clear and close relationship to the parents and pupils of its district as in the *Akron* and *Richmond* cases. Indeed, the State Board previously has voiced its agreement with this position:

> . . . the State Board acknowledges that the local boards in this case share an identity of interests with the individuals subject to their jurisdiction. This commonality of purpose is one reason why the boards have standing to assert their claims. *See Akron Board of Ed.*, 490 F.2d at 1289. Moreover, if "each governmental

> entity is *parens patriae* within the orbit of its own political responsibility," *Bergen County v. Port of N.Y. Authority*, 32 N.J. 303, 311 (1960), then in this case the local boards are the appropriate litigants to pursue district interests.

See April 5, 1993 Letter Memorandum to the New Jersey Supreme Court on behalf of the State Board of Education at 8-9. Cliffs is thus an appropriate party to assert that population's right to be free of state policies making race-conscious determinations of where pupils will attend school, which Cliffs believes violate the Fourteenth Amendment. *See also, Board of Education v. Allen, supra; Brewer v. Hoxie School District No. 46*, 238 F.2d 91, 104-105 (8th Cir. 1956).

As in *Akron* and *Richmond*, Cliffs also suffers direct injury from the state orders, especially the injunction. The existence of other public high school districts as alternatives to Dwight Morrow High School ("DMHS") in Englewood has been critical to Cliffs' ability to retain students in the Cliffs Upper School who would otherwise withdraw at an earlier age to secure places for themselves in academically superior private institutions, resulting in the loss of students, programs and faculty for the Cliffs' district schools. Pa370, 431, 602, 603; 1/13T110-11, 113, 117-118; 1/18T146-149; 1/14T176-190, 193-194.

City of Trenton v. New Jersey, 262 U.S. 182 (1923), *City of Newark v. New Jersey*, 262 U.S. 192 (1923), and *Williams v. Baltimore*, 289 U.S. 36 (1933), upon which the State Board and Englewood rely, as well as the lower court cases cited by Respondents, are all distinguishable, because each involved a government entity suing to vindicate its *own* alleged constitutional rights, not, as here, a government entity suing to vindicate the constitutional rights of the individuals it closely represents. Moreover, Respondents cite these cases for the general proposition that the state may do whatever it wants to its municipalities, but

that ruling is inapposite here, where the state's statutory framework specifically provided the local government entity with rights. N.J.S.A. 18A:38-13 provided for the Cliffs *Board* to be the petitioner, and to address germane issues, including racial balance. N.J.S.A. 18A:38-13 thus gives the Cliffs Board an autonomous role to play vis-a-vis the State similar to the local school board's autonomous role that was recognized in *Rogers v. Brockette*, 588 F.2d 1057, 1066-1067 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979). The State may not be obliged to organize itself that way, but having done so it has conferred standing on Cliffs to assert federal claims against the State. *Id.* at 1069-1070. *Rogers* directly rejects the interpretation of *City of Trenton* proposed here by the State and Englewood. 588 F.2d at 1069.

If Cliffs' arguments cannot be considered because it does *not* have standing, then no injunction should have been issued at all because the persons affected by the injunction — the pupils and their parents — were not before the tribunal. Entry of any order against the non-parties would operate as a denial of due process unless Cliffs is to be deemed an adequate representative of their interests — including the federal equal protection rights of Cliffs' pupils and their parents. In fact, from the outset of this litigation, the administrative agency limited the representation of the constitutional rights of the pupils and their parents implicated in this litigation to the school board parties. The ALJ made an initial determination to exclude proposed individual intervenors based on the Board of Education of the Borough of *Tenafly's* ability to represent the constitutional interests of the parents of its *Englewood* resident private tuition pupils. *See* Appendix to March 30, 1993 Letter Brief of Cliffs to the New Jersey Supreme Court. It must therefore be assumed that *Cliffs* has the standing to represent the interests of the pupils and their parents of its *own* district.[2] If the

2. It should be noted that in raising an equal protection argument on behalf of the pupils of its district and their parents, Cliffs is doing nothing differently (Cont'd)

school boards lacked standing to assert the equal protection arguments of their constituents, while the would-be intervenors, students and parents were excluded from participation, then the entire proceedings denied due process to the unrepresented parties.

For the foregoing reasons, Cliffs has standing in this Court to challenge the State's actions on federal equal protection grounds.

III. THE CASE PRESENTS IMPORTANT, RECURRING ISSUES AS TO WHAT RACE-CONSCIOUS ACTIONS ARE PERMISSIBLE UNDER THE FOURTEENTH AMENDMENT

Respondents have said little of substance on the merits, painting in broad and at times illogical strokes. They argue, for example, that Cliffs has not explained why it did not attack N.J.S.A. 18A:38-13 on its face for having included effect on racial balance as one element among many for the Commissioner of Education to consider in regard to applications for severance. The reason for this is that Cliffs does not contend that all race-conscious actions are invalid, but rather that the interest in taking race-conscious actions must be compelling, and the actions taken both necessary and narrowly tailored to the State's interest. *See* Petition at 21 and *passim*. Such a showing has not been made here.

In particular, one state interest urged is to avoid a small percentage change in the white student percentage at DMHS — 1.6% when the Petition was under review, 6% when Tenafly adopted its private tuition program — but that interest is not compelling. *See Hull v. Quitman County Bd. of Education*, 1 F.3d 1450, 1456 (5th Cir. 1993) ("The possible reduction from 10% to a

---

(Cont'd)
than what Englewood has done in raising equal protection claims in support of its regionalization arguments and in support of its request for an injunction.

5% white student population, while regrettable, imposes no significant detriment to the pre-existing potential for desegregation. Conversely, taking costly steps to try to retain the additional 5% of white students . . . could achieve only a pyrrhic victory in a virtually all black school system.") Indeed, Englewood has the means to achieve substantial integration from its own diverse community. *See* 205a, 235a.

Recognizing the *de minimus* nature of the asserted interest under these circumstances, Respondent Englewood attempts to portray the case inaccurately as involving a "remedy" for *de jure* segregation rather than the pursuit of an affirmative policy of altering *de facto* racial balances. Despite Respondents' constant attempts to do so, they did not present any concrete evidence of *de jure* segregation in this matter, relying instead upon the anecdotal hearsay evidence of possible prejudice of a few individual students, which the ALJ, who was the only individual or body that saw the witnesses and heard the testimony over 99 days of hearings, declined to credit.[3] Respondents have conspicuously failed to present any specific evidence of policies, programs or actions by the Cliffs Board having the intent or purpose to segregate either Cliffs or DMHS. Englewood's arguments notwithstanding, neither the Commissioner nor State Board entered any finding contrary to the ALJ who concluded that (1) DMHS's racial imbalance resulted from *de facto* conditions; (2) neither Cliffs nor Tenafly practiced any intentional discrimination; and (3) Cliffs' petition for severance had been motivated by good faith educational concerns. 228a-229a, 251a-252a, 132a.

---

3. Despite Englewood's attempt to write off the ALJ's findings as subject to *de novo* review, on issues of intent and motivation, deference must be given to the ALJ who heard the testimony of the witnesses and could assess credibility. *Clowes v. Terminix Int'l Inc.*, 109 N.J. 575, 587-538, 538 A.2d 794, 800 (1988); *Matter of Tenure Hearing of Tyler*, 236 N.J. Super. 478, 485, 566 A.2d 229, 233 (App. Div. 1989).

This case thus presents this Court with important, recurring issues as to what race-conscious "affirmative actions" are permissible under the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, as well as those expressed in Cliffs' Petition, this Court should grant Cliffs' Petition for a Writ of Certiorari.

Respectfully submitted,

JOEL D. SIEGAL
Counsel of Record
ROBERT S. RAYMAR
RONNIE F. LIEBOWITZ
BRUCE S. ETTERMAN
MATTHEW E. MOLOSHOK
HELLRING LINDEMAN
GOLDSTEIN & SIEGAL
Attorneys for Petitioner
One Gateway Center
Newark, New Jersey 07102-5386
(201) 621-9020

Dated: November 18, 1993